

Before the
Federal Communications Commission
Washington, DC 20554

In the Matter of)	
)	
Amendment of Part 2 of the Commission's)	
Rules to Allocate Spectrum Below 3 GHz)	
for Mobile and Fixed Services to Support)	ET Docket No. 00-258
the Introduction of New Advanced)	
Wireless Services, including Third)	
Generation Wireless Systems)	

REPLY COMMENTS OF EVERTEK, INC.

Evertex, Inc. (Evertex) hereby replies to the comments filed in response to the Commission's *Fifth Notice of Proposed Rulemaking (Fifth NPRM)* in ET Docket No. 00-258. As will be discussed in more detail below, Evertex strongly supports the proposals advanced by the Wireless Communications Association International, Inc. (WCA) in response to the *Fifth NPRM*. WCA's approach is the only proposal pending before the Commission which both assures that Evertex's extensive operations in the 2150-2162 MHz band will be transitioned to comparable facilities in the 2.5 GHz band at no cost to Evertex, and protects the integrity of our network and subscriber relations during the process.

Evertex uses all of the capacity on its Broadband Radio Service (BRS) licenses to provide multichannel video programming and high-speed broadband services in the agriculturally-based communities of Everly, Palmer and Sioux City, Iowa. Evertex utilizes BRS Channel 1 (2150-2156 MHz) in connection with its high-speed broadband service – the channel is used by over 1,000 of our subscribers to transmit from their outdoor antennas back to the associated base station. We

purchased the rights to utilize BRS Channel 1 at auction in 1996. Because of the rural nature of our service area, the overwhelming majority of our subscribers do not have access to cable modem, DSL or other viable high-speed alternatives.

Evertex is pleased that the *Fifth NPRM* established two overarching policy objectives to guide the relocation of BRS licensees from the 2150-2162 MHz band – (1) that Advanced Wireless Service (AWS) licensees must pay all of our costs associated with the involuntary relocation of our operations; and (2) that the involuntary relocation is to be accomplished in a manner that minimizes disruption to our operations.¹ We believe that the final rules and policies adopted by the Commission in this proceeding must achieve those goals to provide fundamental fairness to companies like ours that, as WCA rightly noted, face involuntary relocation despite having put this spectrum to use precisely as the Commission desired.²

Unfortunately, not all of those commenting in response to the *Fifth NPRM* evidence the same concern about fairness to BRS operators using the 2150-2162 MHz band. In particular, the mobile telephone industry has submitted proposals that, if adopted, would run roughshod over those who today are productively using the 2150-2162 MHz spectrum purchased at auction to provide high-speed broadband services to the public. Proposals have been advanced that would prevent us from adding new subscribers until we are relocated,³ but would impose no obligation

¹ *Fifth NPRM* at ¶¶ 12 and 25.

² See WCA Comments at 5.

³ Verizon Wireless Comments at 6-7.

whatsoever on the part of the AWS licensees to ever relocate us.⁴ To add insult to injury, mobile telephone interests have proposed that if the AWS auction winners in our area chose not to relocate us before some arbitrary “sunset” deadline, afterwards they could commence operations in our market and insist that we either fund our own migration to other spectrum or cease operations.⁵ If, however, an AWS licensee (who will presumably be competing against us in the broadband market) elects to migrate us before the sunset deadline, we would be forced to provide the AWS licensee with confidential information regarding our subscribers, and the future integrity of our network would be dependent upon the equipment chosen and deployed by the AWS licensee. None of this is fair, and none of it should be adopted.

If the Commission truly desires to assure Evertek and other users of the 2150-2162 MHz band that they will be relocated at no cost and with a minimum of disruption, four basic requirements become apparent:

First, the Commission should not “sunset” the AWS licensees’ relocation obligations – not at 10 years as proposed in the *Fifth NPRM* nor at 15 years as now proposed by CTIA.⁶ As WCA explained in detail, the performance requirements

⁴ CTIA Comments at 7-8; Verizon Comments at 4.

⁵ CTIA Comments at 12-13.

⁶ CTIA Comments at 12. Evertek notes that Sprint Nextel has also endorsed a 15 year “sunset”. Sprint Nextel Comments at 45. The Commission should recognize, however, that Sprint Nextel’s operating systems tend to be in urban areas that are almost certain to see AWS deployment during the initial AWS license term. Thus, while Sprint Nextel may not care that the AWS licensee’s obligation to fund relocation ends after 15 years, those like Evertek that are serving rural areas care tremendously because we may not see local AWS deployments during the initial AWS license term.

imposed on AWS licensees provide no assurance that an AWS licensee will build out facilities in rural areas like those that Evertek serves, even within the 15 year term of its license.⁷ Under the proposal advanced by CTIA, after the sunset date arrives, AWS could deploy in our market, and we would be obligated to protect those operations from interference and to suffer any interference AWS causes. As a practical matter, that means we would have to relocate to other spectrum, and we would have to fund that migration ourselves under the proposal advanced by CTIA. The adverse impact this would have on Evertek is obvious – AWS auction winners would have the incentive and the ability to force Evertek to fund its own relocation to alternative spectrum simply by scheduling their deployments in our market after the “sunset” deadline.

Second, the Commission must allow Evertek to continue adding subscribers until we are relocated. CTIA has joined those within the BRS industry in recognizing that BRS service providers must be permitted to add new subscribers served by existing base stations.⁸ However, Verizon appears to be arguing that, to avoid

⁷ WCA Comments at 29.

⁸ CTIA Comments at 12; Sprint Nextel Comments at 23; WCA Comments at 37-41; SpeedNet Comments at 2; C&W Comments at 1. While Evertek is pleased that SpeedNet and C&W share our concern about restrictions on the addition of new subscribers, Evertek cannot agree with the specific proposals advanced by SpeedNet and C&W, since they apparently would halt subscriber growth prior to our actual relocation to comparable facilities on other spectrum. C&W Comments at 1 (proposing that BRS expansion should continue as primary “until the AWS entrant begins the process of initiating its own services on the 2.1 GHz band.”); SpeedNet Comments at 2 (proposing that expanded services “should continue to be regarded as primary operations subject to reimbursement by the AWS entrant until ninety (90) days from the date that the AWS entrant provides written notice that it desires to commence transition negotiations with the BRS licensee.”). Because mandatory negotiations can extend for as long as three years, and involuntary relocation can

additional interference to possible future AWS deployments, Evertek and others should be banned from adding any new subscribers whatsoever until involuntarily relocated from the 2150-2162 MHz band.⁹ It is impossible to square that proposal with the Commission's promise to minimize disruption to BRS operations, as little could be more disruptive than a ban on future growth. Moreover, Verizon's proposal is blatantly anti-consumer. What Verizon is saying, in effect, is that residents of rural areas should be banned from subscribing to wireless broadband services that are currently available, merely to reduce the costs that Verizon will incur if and when Verizon deigns to provide service in our area. It appears that Verizon is confusing the public interest with its own economic interest.¹⁰ To the extent Verizon or any other AWS licensee wants to avoid paying for the migration of additional subscribers

take months (if not years) after that, freezing BRS growth as of the start of the relocation process will substantially hamper those BRS systems that, like Evertek's, are constantly growing. The better approach is that proposed by WCA – allow the addition of new subscribers until relocation is completed.

⁹ Verizon calls for the Commission “to institute a freeze on the construction of new facilities and any other major modifications to BRS systems” to avoid potential increases in interference to AWS. Verizon Comments at 6-7. Although Verizon does not specifically discuss the addition of new subscribers, given that the 2150-2162 MHz band is primarily used for upstream transmissions, and that the source of interference to AWS will therefore come from BRS subscriber units, one could conclude that Verizon is calling for a freeze on new subscribers.

¹⁰ In addition, Evertek must take issue with CTIA's proposal to bar most modifications to existing base stations. See CTIA Comments at 12. While we do not anticipate making any modifications to our base station, it is certainly possible that as technology develops and the public demand for our service grows, we may need to do so. For example, should the AWS licensees delay relocating us for a decade or more, our subscriber growth may require us to re-sectorize our antenna to add additional frequency re-use capabilities. While that may increase the cost of relocating us to alternative spectrum, that should be the price the AWS licensees must pay for delaying relocation.

to alternative spectrum, their solution is to relocate the BRS operations sooner rather than later.

Third, Evertek should not be required to provide a binding estimate of our relocation costs prior to the AWS auction. In self-serving efforts to minimize the BRS relocation costs facing AWS licensees, CTIA and T-Mobile propose: (1) that Evertek be required to submit a pre-auction estimate of our relocation costs; and (2) that, when an AWS licensee finally gets around to relocating us, our recoverable costs would be limited to 110% of that estimate.¹¹ What they conveniently ignore, however, are the several practical reasons why it would be impossible for Evertek to make such an estimate, even if required.

Most significantly, none of the proposals pending before the Commission would provide Evertek with any idea as to when it is likely to be involuntarily relocated following the AWS auction. Every proposal, even those submitted by BRS interests, affords AWS auction winners substantial flexibility in scheduling our relocation based on their own deployment plans. Presumably, different auction participants will have different timelines for deploying service in the rural areas served by Evertek. As such, Evertek cannot accurately predict how many subscribers we will have at the time of relocation, much less what labor and equipment costs will be at that time. Moreover, the involuntary relocation costs will depend on the pricing of equipment that is not available yet. In addition, the costs of providing us with comparable facilities will depend, in part, on the technologies and network designs deployed by our spectrum neighbors. The Commission cannot forget that additional out-of-band

emissions and base station height limitations may apply under Sections 27.53(l)(2) and 27.1221 to our replacement facilities, depending on decisions made by our neighbors.

The obligation of the AWS licensee to provide Evertek with funding for comparable facilities must be based on what we have in place at the time of the involuntary relocation, not what is in place now, and must be based on costs at the time of involuntary relocation, not costs now. Evertek is fully prepared to provide the Commission with information regarding its existing base stations and the number of subscribers it presently serves. An AWS auction participant can take that information, couple it with its own business plan's provisions for relocating BRS, and perform its own due diligence regarding relocation costs. However, given all of the uncertainties here, BRS licensees should not be required to provide binding costs estimates.

Fourth, Evertek should not be required to provide proprietary subscriber information to a competitor. Although at least T-Mobile recognizes that BRS and AWS licensees will be competitors,¹² the mobile telephone interests generally support use of a relocation approach under which the AWS auction winners will be responsible for deploying our comparable facilities, turning them over to us after they have been constructed. However, as WCA and Sprint Nextel correctly point out, that necessarily would require Evertek to provide our competitor with the names and addresses of our subscribers, and then provide our competitor with access to our

¹¹ See CTIA Comments at 9-10; T-Mobile Comments at 3.

¹² T-Mobile Comments at 3.

subscribers' homes.¹³ For all of the reasons identified by WCA and Sprint Nextel, such a requirement would have a material adverse impact on Evertek.

The rules proposed by WCA address our concerns, leveling the playing field in a manner that also protects AWS interests. Because the rules proposed by WCA provide BRS system operators with control over their own relocation, they protect the viability of existing businesses operating on BRS channels 1 and 2. Adoption of the WCA proposal will allow Evertek and others like us to continue growing (particularly in areas where broadband alternatives are not available) with full certainty that when the time comes for our involuntary relocation to the 2.5 GHz band, it will be accomplished at no cost to BRS and in a manner that protects the integrity of the BRS network and proprietary subscriber information. Moreover, WCA's approach is equally fair to AWS applicants. Adoption of the rules proposed by WCA would assure that any AWS licensee can commence the relocation process as soon as it needs to clear BRS from the spectrum, that BRS interests will only be reimbursed for the costs of deploying comparable facilities, and that BRS interests complete their relocation in timely fashion.¹⁴

Therefore, for the reasons set forth above and in WCA's comments in response to the *Fifth NPRM*, Evertek urges the Commission to adopt rules that are fundamentally fair to BRS licensees, system operators and, most importantly, consumers. The proposals advanced by the mobile telephone interests in response

¹³ WCA Comments at 10-14; Sprint Nextel Comments at 25.

¹⁴ WCA Comments at 21-28.

to the *Fifth NPRM* do not achieve that fairness. As such, Evertek urges the Commission to adopt the proposals advanced by WCA,

Respectfully submitted,

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